82-1713

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ALEXANDER L. STEVAS,

NO. 82-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ELIZABETH A. FRAME, ET AL.,

PETITIONERS,

VS.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, ET AL.,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the free exercise clause of the First Amendment and the equal protection clause of the Fourteenth Amendment permit a school corporation to use religious beliefs and practices as a basis to differentiate as to the quality and extent of bus services it provides to school children, where the school corporation has elected to provide the bus service to school children pursuant to a state statute which authorizes it to extend the service to children who attend public and private schools.

2. Whether the Court of Appeals and District Court should have permitted, through certification or abstention, the courts of Indiana to resolve unsettled questions of state law before resolution of the federal constitutional issues.

PARTIES INVOLVED

The parties involved in this petition are Elizabeth A. Frame; Toni M. Potapow; Mary Ann MacCarthy; Barbara Hartzke; Joseph B. Schopmeyer; John M. Williams; Rosemarie Green, parent petitioners, individually and on behalf of all others similarly situated; Jeffrey A. Frame; Michael G. Potapow; Michael P. MacCarthy; Jennifer Hartzke; Jennifer A. Schopmeyer; Sheila A. Williams; Erin Marie Green, minor petitioners, individually and on behalf of all others similarly situated; and South Bend Community School Corporation; James P. Scamman, Superintendent of the South Bend Community School Corporation; Hollis E. Hughes, Jr.; Donald W. Yates; Eileen T. Bender; Oscar T. Brookins; Anthony V. Luber; William L. Wilson; Loretta Jacobsen, Members, Board of School Trustees of the South Bend

Community School Corporation, respondents.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ELIZABETH A. FRAME, ET AL.,)
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PETITIONERS,)
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VS.)
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SOUTH BEND COMMUNITY SCHOOL)
CORPORATION, ET AL.,)
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RESPONDENTS.)

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The petitioners, Elizabeth A. Frame, et al., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 30, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals

is not reported; it is set forth in Appendix A, pp. 1a-14a. The opinion of the United States Magistrate is not reported; it is set forth in Appendix B1, pp. 15a-62a.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on November 30, 1982. A timely petition for rehearing, suggestion for rehearing en banc and motion to certify state law issues to the Indiana Supreme Court was denied on January 27, 1983. The order appears in Appendix C, pp. 73a-75a. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULE

This case involves: U.S. Const., amend. 1; U.S. Const., amend. 14, §1; 42 U.S.C. §1983; Ind. Const. art. 1,

§2, and art. 1, §23; I.C. 20-8.1-2-1(a), 20-9.1-1-3, 20-9.1-1-4, 20-9.1-2-1, 20-9.1-2-29, 20-9.1-7-1, 22-9-1-2, Ind.R.App.P. 15(O).

The Constitutions, statutes and court rule are set out verbatim in Appendix D.

STATEMENT OF THE CASE

1. Background.

In the past, the South Bend Community School Corporation, acting through the Respondent Superintendent of Schools and his predecessors, and by direction of the School Board, has provided school bus transportation for many children living within the limits of the School Corporation, including many Catholic children attending parochial schools (Plaintiffs' Ex. 1, Complaint, ¶6, Appendix F, pp. 93a-

104a.[1] It is not disputed that the purpose of such bus transportation is to ensure that the children get to school as safely and as expeditiously as possible. Some of the parochial schools attended by these children are located on busy highways.

2. The initiation of the discriminatory policy.

In the Spring of 1981, the respondents informed the petitioners that, in the 1981-82 academic year, the vast majority of school children attending parochial schools who had been receiving transportation would be denied that protection. However, at the School Board's June 15, 1981 meeting, in

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1 Approximately 500-525 Catholic students received such transportation. (Plaintiffs' Ex. 4, p. 609; Plaintiffs' Ex. 6, p. 683; Plaintiffs' Ex. 11.)

response to the protest of the petitioners,[2] the Board strongly suggested that a program providing equal treatment for parochial school students would be established. Indeed, a contingency budget figure of $790,000 was adopted. Moreover, to implement the program, respondents requested that representatives of the petitioners gather information with respect to every child living within the School Corporation who attended parochial school. Petitioners undertook this task and, despite administrative complications, submitted all the requested information to the respondents.[3]

However, at the School Board's meeting of September 8, 1981, the Respondent

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2 Affidavit of Elizabeth A. Frame and Ronald Frame; R. 18a.

3 Id.

Brookins, while expressing reservations about treating one group differently from another, introduced a resolution providing that the parochial school students be transported only on a "space available" basis over existing public school routes even though there were 50 new buses available to transport the parochial school children (Plaintiffs' Ex. 2; Plaintiffs' Ex. 5). School Superintendent Scamman had stated earlier that one view was that providing evenhanded bus service would make parochial schools more attractive (Plaintiffs' Ex. 2, Appendix E, p. 88a). At this meeting, the President of the Board, Mr. Hughes, expressed the fear that, by providing equal transportation service, the public schools would lose students (Plaintiffs' Ex. 2, Appendix E, p. 89a). Board Member

Yates expressed concern for "our competition" (Plaintiffs' Ex. 5, Appendix E, p. 92a). The motion carried by a vote of six to one (Plaintiffs' Ex. 5, Appendix E, p. 92a).

3. The present litigation.

This case was originally filed in the Superior Court of St. Joseph County, Indiana, on September 22, 1981. In their complaint, the petitioners alleged that the action of the School Board violated the Indiana Pupil Transportation Statutes and other state statutes. In essence, they submitted that those statutes (Appendix D, pp. 80a-82a), when read together, require that, when a school corporation determines that the safety of children living within the school corporation requires that transpor-

tation be provided, it must be provided evenhandedly to all children regardless of the school they attend. Additionally, petitioners alleged that they had been denied their free exercise and equal protection rights as guaranteed by Art. 1, §§2 and 23, Indiana Constitution, and Amendments 1 and 14 of the United States Constitution.

On October 5, 1981, the respondents removed the case to the United States District Court for the Northern District of Indiana, South Bend Division, and then filed a motion to dismiss petitioners' complaint for failure to state a claim upon which relief could be granted (Appendix G).

At a subsequent hearing, on petitioners' motion for class certification, preliminary injunction and on respondents'

motion to dismiss, respondents, while acknowledging that they had the responsibility to at least provide parochial school students transportation to the extent permitted by excess capacity aboard existing school buses on existing school bus routes,[4] admitted that they had not done so (TR. pp. 6, 7, 49, 87).

Subsequent to this hearing, the respondents proposed to permit some parochial school students to ride the school bus bound for the public schools over previously established routes. However, the parents of these children would be required to sign a waiver of liability, releasing the School Corporation from any liability should the child be injured while riding on the school bus or in

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4 Thomas E. Reidy Affidavit, ¶2; R. 16.

walking from the drop-off point to the parochial school involved (Ex. F-2 and F-3 to Reidy Aff.; R. 16). Parents of children attending public schools are not required to sign a waiver of liability as a condition precedent to their child being allowed to ride the school bus (Elizabeth A. Frame Aff.; R. 15a; Toni M. Potapow Aff.; R. 15b).

4. The decision of the Magistrate.

The United States Magistrate[5] granted the respondents' motion to dismiss the complaint. Relying heavily on a section of the state busing statutes that exempted

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5 The District Judge, after hearing the evidence submitted at the October 15, 1981, hearing, recused himself because he had children attending parochial school. By agreement of the parties, the case was referred to a United States Magistrate for trial as authorized by 28 U.S.C. §636.

school buses owned by private schools and school bus driver contracts executed with private schools from complying with certain sections of the statutes, he held that Indiana law only required that parochial school children be given school bus transportation if they lived on or along the regularly established school bus route to the public school and, then, only if they could be accommodated on available extra seats.[6] With respect to the federal constitutional issues, the Magistrate held that his interpretation of the Indiana statutes was permissible. He relied on this Court's summary affirmance in Luetkemeyer v.

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6 The Magistrate relied on no decision of an Indiana Court directly supporting his interpretation of the statutory scheme.

Kaufmann, 419 U.S. 888 (1974), and suggested that Norwood v. Harrison, 413 U.S. 455 (1973), had "clarified the 'child benefit' theory" of Everson v. Board of Education, 330 U.S. 1 (1947) (Appendix B1, p. 54a).

The Seventh Circuit affirmed the Magistrate as to the dismissal of the federal claims, but reversed the disposition of the state law claims[7] and directed that the state law claims be remanded to the state trial court where petitioners had originally filed this case (Appendix A, pp. 1a-14a).

In the petition for rehearing, the

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7 Apparently the Court of Appeals' reference to the state law claims refers to the respondents' admitted unfulfilled minimal obligation to permit parochial school students to ride the public school bus on a space available basis.

Seventh Circuit was asked to certify all the state law questions to the Indiana Supreme Court, as authorized by Ind.R. App.P. 15(O). The Seventh Circuit denied the petition for rehearing and motion to certify the state law questions on January 27, 1983 (Appendix C, pp. 73a-75a).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

At the outset, it is important to note that this case does not raise the issue of whether school bus transportation for students attending parochial schools violates the Establishment Clause. In Everson v. Board of Education, supra, this Court recognized that a state could afford such protection to its young citi-

zens regardless of their parents' choice of educational facility. Indeed, by statute,[8] Indiana has authorized local school corporations to provide such assistance, and the respondents, prior to 1981, undertook to provide such protection. Even since 1981, they have undertaken to provide some protection to some members of the class. However, they have discriminated as to the quality and extent of those services on the basis of the parents' choice -- based on religious belief -- of educational facility. In

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8 Other states with similar statutes are:

Ohio Rev.Code Ann. §3327.011 (Page 1967);
Mich.Stat.Ann. §15.4141 (Callaghan 1981);
Minn.Stat.Ann. §123.76, et seq. (West 1969);
24 Pa.Cons.Stat.Ann. §13-1361 (Purdon 1979);
W.Va.Code §18-5-13(6) (1981).

short, in South Bend, Indiana, the School Corporation has decided that the child attending a public school is worthy of more taxpayer protection from the hazards of traffic and climate than the child whose parents have chosen a religious school.[9]

Discrimination based on religious preferences is subject to strict judicial scrutiny, Kramer v. Union Free School District, 395 U.S. 621 (1969). Here, the Court of Appeals and the District Court

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9 This decision of the School Corporation cannot be explained away on the ground that government officials have simply made a decision as to the most effective use of available funds. Cf. Dandridge v. Williams, 397 U.S. 471, 485-487 (1970). Here, the funds had been allocated, buses were available (Appendix E, pp. 89a-90a) and there is evidence that the School Board took its discriminatory action in order to burden the religiously-based choice of the petitioners (Appendix E, pp. 89a-92a).

apparently tolerated this discrimination on the basis of religion because they characterized school bus transportation as an assistance to the parochial school rather than as the provision of a safety service to individual citizens.[10] Conse-

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10 Both the Magistrate and the Court of Appeals relied heavily on Norwood v. Harrison, 413 U.S. 455 (1973). In Norwood, this Court struck down text book loans to students attending private schools with racially discriminatory policies on the ground that such assistance amounted to a form of tangible financial assistance benefiting the schools themselves. The Norwood Court was emphatic, however, in distinguishing its earlier holding in Everson v. Board of Education, supra, noting that even if certain forms of assistance to individuals such as textbooks (significantly, the Court did not mention school bus transportation) could be characterized as indirect aid to sectarian schools, Cf. Board of Education v. Allen, 392 U.S. 236 (1968), the "leeway for indirect aid to sectarian schools has no place in defining the permissible scope of state aid to private

quently, they appear to reason, countervailing establishment clause concerns permit the School Corporation to "withdraw from the verge," (Appendix B1, pp. 56a-57a) of impermissible aid to parochial schools.[11] In Everson v. Board

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racially discriminatory schools," 413 U.S. at 464, n. 7. This Court has adhered to this distinction in cases subsequent to Norwood. See, e.g. Meek v. Pittenger, 421 U.S. 349, 359-62 (1975).

11 The Magistrate and the Court of Appeals relied upon and, indeed, seemed to believe themselves bound by Luetkemeyer v. Kaufmann, supra. Summary affirmances are not binding on this Court. Edelman v. Jordan, 415 U.S. 651, 671 (1974); see also Fusari v. Steinberg, 419 U.S. 379, 391 (Burger, C.J., concurring). Moreover, Luetkemeyer dealt with a significantly different situation. There, the Legislature of Missouri had not undertaken to provide any transportation to any parochial school children on the grounds that the Missouri Constitution involved an interest in "maintaining a very high wall between

of Education, supra, this Court made it clear that providing such protection to children is not assistance to the school which they attend. The primary purpose and effect of school bus transportation is to ensure that children are protected from the hazards of traffic and weather (usually a significant problem for most of the school year in the area). Moreover, with respect to the potential for religious-based discord in the community, it is obvious that it is discrimination

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church and state," 364 F.Supp. 376 (W.D.Mo. 1973). It is doubtful that Luetkemeyer could be decided on the same rationale today. See Widmar v. Vincent, 454 U.S. 263, 275 (1982). In any event, here the Indiana Legislature has evidenced no independent state interest in maintaining such a "very high wall." Indeed, it has authorized such assistance to children attending parochial schools (Appendix D, pp. 80a-87a).

on the basis of religion in providing safety services -- not evenhandedness in delivery -- which brings the very real possibility for such a problem. Cf. Widmar v. Vincent, supra.

Furthermore, the discriminatory action of the respondents directly burdens the free exercise rights of the petitioners. Petitioners, as a matter of their religious belief, have chosen to send their children to parochial schools.[12] Here, the respondents are directly burdening that right by withholding a state-provided safety service unless the petitioners conform to the

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12 Freedom of choice with respect to the education of one's children is protected even when that choice is not based on religious belief. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

government's will and send their children to public school. Moreover, this is not a case in which the free exercise complaint is premised simply on the effect of government action -- however well intentioned that government action may have been. See e.g. Thomas v. Review Board of Indiana Employment Sec., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972). Here, it is clear that the respondents chose to force petitioners' children to make their own way through the snow to school as an incentive to get parochial school children to transfer to the public schools. This motive is evidenced by comments made by the respondents in the course of their public meetings.[13] For instance, School Superin-

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13 These statements were received in

tendent Scamman stated that providing bus transportation makes parochial schools more attractive (Appendix E, p.

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evidence by Judge Sharp during the October 15, 1981, hearing on a preliminary injunction. In their brief in the Court of Appeals, respondents contended that these statements were not properly before the Court since Magistrate Lee had, in a subsequent unreported status conference, stated he would not be bound by evidence submitted at the October 15, 1981, hearing in ruling on respondents' motion to dismiss. Petitioners, in their reply brief in the Court of Appeals, took sharp issue with respondents' rendition of the status conference, noting that the Magistrate, in asserting that " . . . the defendants have repeatedly averred their intent to continue to provide such transportation (seats available busing only) . . . , " necessarily considered evidence presented at the October 15, 1981, hearing and, therefore, should have considered the motion as one for summary judgment. The Court of Appeals acknowledged that evidence had been offered by plaintiffs (Appendix A, p. 7a).

88a). School Board President Hughes feared that, by providing equal transportation service, the public schools would lose more students (Appendix E, p. 89a). Board Member Yates expressed concern for "our competition" (Appendix E, p. 92a). If, in an effort to avoid declining school enrollment, the benefits of public welfare legislation" are to be withheld from those who do not choose a government education, the State will indeed have become the "adversary" of religion and of those who wish to freely exercise their beliefs.

2. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the Magistrate as to call for an exercise of this Court's power of supervision.

The Indiana statutes with respect

to school bus transportation are contained in many sections of the Code. There has been no relevant interpretation of those Code provisions by the courts of Indiana.

Petitioners originally brought this action in the Indiana state court. The state court could easily have given the Indiana statutory scheme an interpretation which would have avoided the necessity of reaching the federal constitutional question. In essence, petitioners took the position that the Indiana statutory scheme, read in its entirety, required that school bus transportation be afforded all children, regardless of the school they attended -- parochial, private or public. They submitted that one ought not to conclude that the Indiana Legislature would act

irrationally by permitting a school corporation to fulfill a safety function through busing arrangements whereby parochial school children would be picked up and dropped off significant distances from their homes and schools and left, despite their ages, to cope with the hazards of climate and traffic. Upon removal to the District Court, the Magistrate, without the benefit of any state judicial construction of the statutory scheme, construed the state statute to permit such discrimination and proceeded to resolve the federal questions.

The Court of Appeals not only sanctioned this ad hoc determination of state law but also, despite the existence of an established certification procedure, declined to seek

guidance from the Supreme Court of Indiana as requested by petitioners.[14]

Here, where state social policy is so critical to the dispute, the ends of justice and the principles of federalism can only be served by permitting the state courts to determine what state law means. Railroad Comm. of Texas v. Pullman Co., 312 U.S. 496

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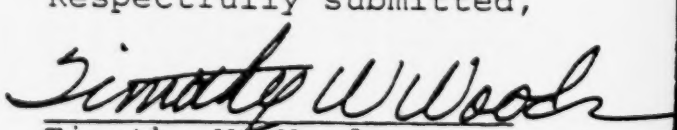
14 This Court should certify the state law issues to the Indiana Supreme Court, Ind.R.App.P. 15(O), (Appendix D, p. 85a). Even if the state law questions are not certified, this Court, on its own motion, should remand this case to the District Court and direct that it abstain from deciding the federal issues until the state courts have been given an opportunity to interpret the state statutes involved here. Bellotti v. Baird, 428 U.S. 132 (1976); Albertson v. Millard, 345 U.S. 242 (1953); City of Chicago v. Fieldcrest, 316 U.S. 168 (1942).

(1943); Burford v. Sun Oil Co., 319 U.S. 315 (1943). By resolving the state law question in this case without permitting the state courts to interpret the state statutes, the courts below have intruded in an unwarranted manner into state law issues and have decided federal constitutional questions when an authoritative pronouncement of the state law issues could have eliminated or greatly changed the federal questions.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

ORDER OF THE COURT OF APPEALS

OF NOVEMBER 30, 1982

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604
(Argued September 13, 1982)

November 30, 1982

Before

HON. WILLIAM J. BAUER, Circuit Judge

HON. PAUL C. WEICK, Senior Circuit Judge*

HON. RICHARD D. CUDAHY, Circuit Judge

ELIZABETH A. FRAME, et al., Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 82-1383 vs.	)	
SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al., Defendants-Appellees.	)	Civil No. 581-0344 Gene B. Lee, Magistrate.

O R D E R

This appeal is from an order of the

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* The Honorable Paul C. Weick, Senior Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

district court granting the defendants' motion to dismiss the complaint for failure to state a claim upon which relief may be granted and entering judgment dismissing the complaint. We affirm in part and reverse in part.

The action was filed originally in the Superior Court of St. Joseph County, Indiana. It was removed by the defendants to the Federal District Court for the Northern District of Indiana, South Bend Division. It was certified as a class action by the district court and by agreement of the parties was referred by the court to a United States Magistrate for trial as authorized by 28 U.S.C. § 636.

The plaintiffs in the action were parents and their children who were attending private Catholic parochial

schools in the jurisdiction of the School Corporation. The defendants were the South Bend Community School Corporation, the Superintendent of the School Corporation and the members of its Board of Trustees.

The plaintiffs sought a declaratory judgment to the effect that the failure of the School Corporation to furnish free transportation by bus to the children attending their parochial schools, violated not only the Constitution and statutes of Indiana, but also the Constitution of the United States, particularly the Fourteenth Amendment and the Civil Rights Act of 1871, 42 U.S.C. 1983. The complaint sought a mandatory injunction to require the transportation on equal terms with public school children and

prayed for damages.

The defendants in their motion to dismiss for failure to state a claim upon which relief could be granted, stated in paragraph 2 thereof:

> '2. The defendants are willing to provide transportation to that number of non-public school students who can be accomodated [sic] in school buses already in operation over regularly established routes for the reason that the laws and the Constitution of the State of Indiana and the Constitution of the United States require them to do no more.'

Thus, plaintiffs were not denied all rights to transportation. They claimed to have the same rights as public school children and that their constitutional rights were thereby violated.

The Magistrate gave careful consideration of the issues in the case in a 17 page Memorandum & Order. There was no dispute between the parties that all children living in the school district were entitled to be transported to the public schools in the school district irrespective of their race or religion. The controlling issue here is whether children attending private Catholic parochial schools were entitled to be transported at taxpayers' expense to their own private schools the same as public school children.

The Magistrate held that no rights of the plaintiffs under the Fourteenth Amendment to the Constitution of the United States had been violated. He relied on Norwood v. Harrison, 413 U.S. 455, 462 (1973), that the state could withhold all assistance; Luetkemeyer v. Kaufmann, 364 F. Supp. 376, affirmed in 419 U.S. 888 (1974); Brusca v. State of Missouri, 332 F. Supp. 275, affirmed 405 U.S. 1050 (1972). The Magistrate also held that the transportation permitted by the School Corporation was authorized by state law and its Constitution, and no rights of the plaintiffs under the Constitution had been violated.

Although plaintiffs offered some evidence, it must be remembered that the Magistrate disposed of the case solely by granting defendants' motion

to dismiss the complaint. The only question involved was one of law, that is, whether the complaint stated a claim upon which relief could be granted. The Magistrate held that the complaint did not state such a claim and, in our opinion, based upon the decisions of the Supreme Court on which the Magistrate relied, he was correct.

The Magistrate was also correct in denying plaintiffs' motion for a new trial, to make findings of fact, and to amend the judgment of dismissal to include a mandatory injunction requiring the defendants to furnish transportation to parochial school children the same as furnished to public school children as required by Indiana law. When the Magistrate dismissed the federal claims, he did not abuse his discretion in de-

clining to exercise pendent jurisdiction to decide claims under state law, relying on United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Nor did the Magistrate err in denying both parties' motions for attorney's fees.

We reverse, however, the ultimate disposition of the state law claims. Instead of dismissing these claims once it had decided that pendent jurisdiction would not be exercised, the district court should have remanded the state law claims to the state court. Though United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966), states, 'if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well,' one must read this in light of the fact that in Gibbs the plaintiff had brought his claim in federal court

so that there was no alternative to dismissing the state law claims. The same is true of the case cited by the Gibbs Court in support of the language quoted above. Gibbs, 383 U.S. at 726 n. 16, citing Wham-O-Mfg. Co. v. Paradise Manufacturing Co., 327 F.2d 748, 749 (9th Cir. 1944). Plaintiffs here, however, brought their action in state court.1/ The case reached federal court via the defendants' removal petition. In this context, we see no purpose in re-

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1/ The Court in Gibbs was concerned with plaintiffs trying to misuse the federal forum to litigate essentially state law actions. '[R]ecognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case.' Gibbs, 383 U.S. at 727.

quiring plaintiffs to file anew in state court; fairness dictates a remand. Till v. Unifirst Federal Savings and Loan Ass'n, 653 F.2d 152, 162 (5th Cir. 1981), Ondis v. Barrows, 538 F.2d 904, 908 (1st Cir. 1976). Requiring a refiling means that plaintiffs' case would have a lower priority upon its return to the state court system. Also, though apparently not a problem here, statute of limitations issues could arise if remand is not used. See also Brough v. United Steelworkers of America, AFL-CIO, 437 F.2d 748, 750 (1st Cir. 1971), J. Moore, 1A Moore's Federal Practice ¶ 0.169[1] at 561 n.33, 'The purpose of removal jurisdiction is to give a defendant, in certain cases, a right to trial in a federal forum, not a means of escaping trial in both the state and federal

forums.'

The judgment entered in the district court is therefore affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this order.

Unpublished Per Curiam Order

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

November 30, 1982

Before

HON. WILLIAM J. BAUER, Circuit Judge

HON. PAUL C. WEICK, Senior Circuit Judge*

HON. RICHARD D. CUDAHY, Circuit Judge

ELIZABETH A. FRAME, et al., Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division
No. 82-1383 vs.	)	
SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al., Defendants-Appellees.	)	Civil No. 81-344 GENE G. LEE, Magistrate

This cause was heard on the record

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* Honorable Paul C. Weick, Senior Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED IN PART AND REVERSED IN PART, and the cause is REMANDED, in accordance with the order of this Court entered this date. Each party is to bear its own costs on appeal.

APPENDIX B1

DISTRICT COURT'S ORDER OF DISMISSAL

OF JANUARY 18, 1982

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ELIZABETH A. FRAME, et al.,

Plaintiffs,

vs. CIVIL NO. S81-0344

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,

Defendants.

MEMORANDUM AND ORDER

This suit was originally filed on September 22, 1981, in the St. Joseph County Superior Court. The complaint seeks a declaratory judgment that the failure to provide transportation for parochial students to and from school on equal terms with public school students is contrary to Indiana's compulsory school attendance and pupil transportation laws, the federal Civil Rights Act of 1871, 42 U.S.C. §1983,

and both state and federal constitutional guarantees. The complaint seeks a mandatory injunction requiring that transportation be provided on equal terms, and damages under §1983. On October 5, 1981, the defendants procured the removal of this action to Federal Court. No petition for remand was filed. This cause was certified as a class action by order dated October 21, 1981, and was referred to the United States Magistrate for all further proceedings by order dated November 6, 1981.

The defendants herein move to dismiss the complaint on the grounds that they are willing to provide transportation to all non-public school children who can be accommodated in school buses already in operation over regularly established routes. They contend that

under the law of Indiana and under the Constitutions of both Indiana and the United States, no more is required of them. In response, the plaintiffs argue that Indiana law and public policy entitles parochial school children to transportation on the same terms and conditions as public school children, and that any other interpretation would conflict with Indiana and United States Constitutional guarantees.

The class certified in this cause includes the named plaintiffs and all parents whose children now or in the future attend a Catholic parochial school located within the jurisdiction of the South Bend Community School Corporation and all school children who now attend or who in the future attend Catholic parochial schools

within the jurisdiction of the South Bend Community School Corporation. The plaintiffs' claims for injunctive relief were certified under Federal Rules of Civil Procedures 23(b)(2), and the parent plaintiffs' claims for monetary relief were certified under Federal Rules of Civil Procedures 23(b)(3). Central to all claims is the issue raised in the defendants' Motion to Dismiss of whether the defendants are under a duty, statutory or constitutional, to provide transportation for parochial school children on equal terms with public school children. Consistent with the policy of treating as (b)(2) actions those maintainable as both (b)(2) and (b)(3) class actions,[1] the Court will

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1 See Elliot v. Weinberger, 564 F.2d

not require notice prior to resolution of this issue:

> Such a course promotes both ease of administration and the underlying principles of Rule 23. If the union is successful in the final analysis, the class will be bound, and all members of the class will be precluded from any claim of the same nature (though, of course, claims of limited specified

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1219, 1229 N.14 (9th Cir. 1977); Wetzel v. Liberty Mutual Insurance Company, 508 F.2d 239, 253 (3rd Cir. 1975); Bing v. Roadway Express, Inc., 485 F.2d 441, 447 (5th Cir. 1973); Van Gemert v. Boeing Company, 259 F.Supp. 125, 130-31 (S.D.N.Y. 1966). 3B MOORE'S FEDERAL PRACTICE ¶23.31 [3] (2d ed. 1981).

individual discrimination would not). In the final analysis if plaintiffs are successful, then the court would proceed with the monetary awards which might be due the individual members. This would necessitate notice to all members of the class under rule 23(b)(3).

White v. Local 207 of Laborers' International Union of North America, 387 F.Supp. 53, 54-55 (W.D.La. 1974). All members of the (b)(3) class are members of the (b)(2) class, and their positions regarding the Motion to Dismiss are identical. As members of the (b)(2) class, they have no right to 'opt out' and would be bound by this Court's

decision on the pending motion, favorable or unfavorable. Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Airline, Inc. 490 F.2d 636, 642 (7th Cir. 1973) cert. denied sub nom. Air Line Stewards & Stewardesses Ass'n, Local 550 v. Sipes, 416 U.S. 993, 94 S.Ct. 2406, 40 L.Ed.2d 773 (1974). There is no danger of 'one-way intervention' under these circumstances. Compare Shane v. Northwest Industries, Inc., 49 F.R.D. 46, 47 (N.D.Ill. 1970) (Striking as untimely precertification motion for summary judgment on named plaintiffs' individual claims), with White v. Local 207 of Laborers' International Union of North America, supra, 387 F.Supp. at 54-55.

Notice to (b)(2) class members is required only if special circumstances

indicate that the interests of due process require more than the protections inherent in the certification procedure. See Redhail v. Zablocki, 418 F.Supp. 1061, 1066-67 (E.D. Wis. 1976), affirmed 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), and the authorities cited therein. Such special circumstances are suggested in Rule 23(d)(2), which provides that notice may be given class members so that they might 'signify whether they consider the representation fair and adequate,... intervene and present claims or defenses, or otherwise... come into the action.' See Redhail v. Zablocki, supra, 418 F.Supp. at 1067-68. In the present case, such intervention would be more productive of delay and procedural complications than of benefit to the proceedings.

There are no factual disputes material to the issues raised by the defendants' Motion to Dismiss. Those issues are of statutory construction and constitutional law only, and have been thoroughly briefed. The named plaintiffs' interest are precisely identical to those of the class members, and there is no question of the competency of plaintiffs' counsel. It appears that the class members could accomplish nothing by taking active part in these proceedings that has not already been done on their behalf. In such circumstances, notice is not required. See Elliott v. Weinberger, 564 F.2d 1219, 1228-29 (9th Cir. 1977) reversed in part on other grounds sub non. Califano v. Yamasaki, 442 U.S. 682, 99 S.Ct. 2545, 60 L.Ed.2d 1063 (1979);

and Souza v. Scalone, 563 F.2d 385, 386 (9th Cir. 1977).

Upon thorough consideration of the parties' positions respecting the Motion to Dismiss, the Court concludes as set out hereinafter that the motion should be granted.

I

In the absence of an express statutory directive, there is no duty to provide free transportation for school children under Indiana law. State ex rel. Beard v. Jackson, 168 Ind. 384, 81 N.E. 62, 64 (1907); Nelson v. State, 168 Ind. 491, 81 N.E. 486 (1907). General authority to provide such transportation presently exists in I.C. 1971, 20-9.1-2-1 and -2, which provide that the governing body of each school corporation may provide transportation for

school children and that the school corporation is responsible for procuring the necessary buses and drivers. Because the statutory definition of 'school children' expressly includes children enrolled in private schools, I.C. 1971, 20-9.1-1-4, the plaintiffs contend that these provisions require transportation of parochial school children on equal terms with public school children. This interpretation is foreclosed however by I.C. 1971, 20-9.1-2-29, which provides that none of the sections in that chapter, including I.C. 1971, 20-9.1-2-1 and -2, shall have application to any private school or to any school bus driver contract executed for a private school.

A review of Article 9.1 on Pupil Transportation as a whole discloses many indications that the legislature

contemplated private schools would provide their own transportation services. See, e.g. I.C. 1971, 20-9.1-3-7 (requiring attendance at annual safety meeting); I.C. 1971, 20-9.1-4-5 (1981 Supp.) (annual inspection of buses); I.C. 1971, 20-9.1-5-1 (1981) Supp.) (limiting use of school buses). Such an exercise is unnecessary, however. The Court would not endeavor to infer from these various safety provisions an unexpressed intent to provide transportation on equal terms for parochial school children where a specific provision addressing the question imposes express limitations. See Brown v. Gardner, 159 Ind.App. 586, 308 N.E.2d 424, 427 (1974) quoting Garvin v. Chadwick Realty Corp., 212 Ind. 499, 9 N.E.2d 268, 273 (1937).

Provision for transportation of parochial school children is made in I.C. 1971, 20-9.1-7-1, which states:

> When school children who are attending a parochial school in any school corporation reside on or along the highway constituting the regular route of a public school bus, the governing body of the school corporation shall provide transportation for them on the school bus. This transportation shall be from their homes, or from some point on the regular route nearest or most easily accessible to their homes, to and from the parochial school or to and from the point on the regular route which is nearest or most easily accessible

to the parochial school.

The limitation to regular routes of public school buses is unambiguous and not uncommon. See, e.g., Alaska Statutes §14.09.020 (S.L.A. 1972, chap. 157, §1) and A.C.L.A. cum.supp. 1958, §37-11-5; Calif. Educ. Code § 39808 (1976) and §16257 (1943); Oklahoma Statutes, Title 70 §1196 (1941); Washington, Laws of 1941, chap. 53 §2 p. 120. See also Fox v. Board of Education of the Township of West Milford, 93 N.J.Super. 544, 226 A.2d 471 (1967), construing a similar limitation in N.J.S.A., 18:14-8. Whether the Indiana statute's phrase 'on the school bus' is intended to impose an additional limitation is not entirely clear on the face of the enactment, however. Compare Laws of Maryland 1937,

chap. 185, adding §§146A and 146B to Public Local Laws of Baltimore County, which includes a similar phrase 'on the said buses or conveyances' but also expressly provides that transportation be 'upon the same terms and conditions as now or as may be hereafter established... for children attending public schools.' In Board of Education of Baltimore County v. Wheat, 174 Md. 314, 199 A. 628 (1938) construing this law, the Court expressly noted that '[i]t is not a use of surplus space that is provided for, within the principle applied in permitting private use of schools and other public buildings.... It is a use without regard to extra space, and money is to be provided by the taxpayers for an expected expense from it.' Id., 199 A. at 630-31. It must be noted

however, that the legislature of Maryland in other instances had imposed just such a limitation. Laws of Maryland 1933, chap. 447, and Laws of Maryland 1935, chap. 28, expressly limit transportation of non-public school children in St. Mary's County to those occasions where they may be accommodated on school buses already provided for public school children. With such enactments for comparison and express provisions for equal privileges, the legislative intent was clear.

Unlike the Maryland law construed in Fox, the Indiana law makes no special provision for funding of any additional expense. Cf. I.C. 1971, 20-9.1-7-2 and -3 (costs of transporting children living on State-owned property and certain high school pupils to be paid

out of the general fund of the State and out of special school funds, respectively). This is some indication the Indiana legislature did not contemplate that any additional expense would be incurred in providing transportation for parochial school children under the terms of I.C. 1971, 20-9.1-7-1. A review of the history of such provisions in Indiana law confirms this view.

In 1921, a bill was enacted authorizing the transportation of school children. As indicated by the title of that Act, such transportation was exclusively for children attending public schools. Acts of 1921, chap. 253, §2, p. 743. In 1933, that Act was amended to provide 'for the transportation of children to parochial schools in certain cases....' Acts of 1933, chap. 54, §2,

p. 414. The 1933 enactment added the following language to the original act:

> Where school children who are attending any parochial school in any school corporation of this state reside on or along the highway constituting the regular route of a public school bus or conveyance, the school trustee shall afford transportation, without extra charge, by means of such school bus or conveyance, for the children attending any such parochial school, from their homes, or from some point on the regular route nearest or most easily accessible to their homes, to such parochial

> school, or to the point on such regular route which is nearest or most easily accessible to such parochial school.

Burns' Ann. Stat. §28-2805 (1948 Repl.).

An official opinion issued by the Indiana Attorney General regarding the 1933 enactment opined that the act 'neither requires nor authorizes the school trustee or trustees to place any additional bus on the route in order to accommodate parochial pupils otherwise eligible for transportation.' 1936 O.A.G. p. 415, 416. The Attorney General relied upon the phrase 'by means of such school bus or conveyance' in reaching this conclusion:

> The phrase last quoted obviously refers to the school

bus or conveyance already being operated over such regular, established route....

Apparently the legislature only intended to extend the privilege of free transportation to parochial pupils where they could be accommodated in the bus or conveyance already in use on such regular route, as otherwise there would have been no purpose in inserting the limiting phrase.... Conversely, if the legislature had intended to impose an unqualified duty on the respective school trustees

> to afford transportation for parochial school children, regardless of whether or not additional busses would be required for such purpose, then this result would have been accomplished simply by omitting the phrase in question.

Id., at 416. The Attorney General may have had a similar Illinois statute in mind in regard to the latter remark. In the same year that Indiana first provided for transportation of parochial school children in certain cases, Illinois enacted a strikingly similar statute which did not include the particular phrase which the Attorney General found significant in the Indiana Act:

In case children who attend any school other than a public school reside on or along the highway constituting the regular route of any public school, bus or conveyance provided by any school district for transporting pupils to and from the public schools, the board of directors or board of education of such district shall afford transportation, without extra charge, for such children from their homes, or from such point on the regular route nearest or most easily accessible to their homes to such school, other than a public school,

or to the point on such regularl route which is nearest or most easily accessible to such school.

Illinois Laws of 1933, p. 1048 §1 (emphasis added). The present version, Ill. Rev. Stat. 1971, chap. 122, para. 29-4, has been held to require the purchase of additional buses in order to accommodate non-public school children residing along established routes. Board of Education, School District No. 142 v. Bakalis, 54 Ill.2d 448, 299 N.E.2d 737 (1973). In holding the provision constitutional, the court noted that this had been the practice since 1933.

In 1965 the Indiana Legislature enacted the School Transportation Code, Acts 1965, chap. 260, §§101-910, p. 663,

found in Burns' Stat. Ann. §§28-5101 - 28-5151 (1970 Repl.). This Code, in nine Articles, granted general authority to transport school children and established requirements relating to bus driver contracts, qualifications and compensation of bus drivers, safety regulations and inspections by a State School Bus Committee. Among the miscellaneous provisions is §28-5143. The language of that provision is nearly identical to the earlier provision for transportation of parochial school children found in Burns Stat. Ann. §28-5002 (1970) Repl.) (deleting 'or conveyance' in two instances, substituting 'the governing body of such school corporation' for 'the school trustee,' and adding 'and from' to the last clause referred to 'such parochial

schools' and 'the point on such regular route.'). According to the Report of the Commission to Recodify School Transportation Laws,[2] the paramount objective of the codification was safe, efficient transportation:

> It was the commission's belief that the safety of all Hoosier school children should be insured by requiring every school bus - regardless of the nature of the institution it serves - to comply with safety and inspection regulations. Private schools are, however, excluded from

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2 The Commission was created by Indiana Acts 1963, chap. 414.

most stipulations outside of these areas....

Report, at 178 (original emphasis).[3] With regard to provision of transportation, the Commission stated that '[t]he situation vis a vis the avail-

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3 In relation to the policy underlying school transportation law, the plaintiffs refer to I.C. 1971, 20-8.1-2-1(a), which provides that the public policy in Indiana is '[t]o provide, furnish and make available equal, nonsegregated, nondiscriminatory educational opportunities and facilities for all regardless of race, creed, national origin, color or sex.' That (sic) specific duties imposed by that chapter indicate however that the above public policy is to be implemented by the establishment of a public school system, open to all, in which segregation has no place. Viewing that stated policy in the context of the whole chapter, it cannot be construed as contemplating the provision of equal benefits to those who choose not to avail themselves of those educational opportunities and facilities.

ability of public school buses to parochial school students will remain exactly the same as it is under today's laws.' Report, at 179. It is apparent that 'today's laws' as contemplated by the Commission was correctly interpreted by the Indiana Attorney General in 1936 O.A.G. p. 415, previously quoted herein. See 1964 O.A.G. No. 12, p. 44, in which the Chairman of the Commission sought an opinion as to the advisability of further clarification of the provision in question. It is clear then that the School Transportation Code of 1965 was not intended to require transportation of parochial school children on equal terms with public school children, and that the Code was intended to require transportation of such children only when they could be accommodated on

public school buses already in operation.

Indiana law regarding school transportation was again recodified in Indiana Acts 1973, P.L. 218. This is the present Code found in Title 20, Article 9.1. The most cursory review discloses that it is closely modeled on the Code of 1965, in both form and substance.[4] Most of the language is retained in the new Code. Compare, e.g., I.C. 1971, 20-9.1-2-1 with Burns Ann. Stat. §28-5103 (1970 Repl.); I.C. 1971, 20-9.1-2-2 and -3 with Burns Ann. Stat. §28-5104 (1970 Repl.). Like the Code of 1965, the

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4 See Acts of 1973, P.L. 218, §6(a), stating that '[t]he provisions of this act are intended to be a codification or restatement of applicable or corresponding provisions repealed by this act.

present law regulates school corporation contracts for providing transportation and exempts private schools. Compare I.C. 1971, 20-9.1-1 to -29, with Burns Ann. Stat. §§28-5103 to 28-5118 (1970 Repl.). Safety measures relating to buses and drivers' qualifications are established and inspections provided for, from which private schools are not exempt. Compare I.C. 1971, 20-9.1-3-1 to -11 and 20-9.1-4-1 to -10 with Burns Ann. Stat. §§28-5119 to 28-5129 (1970 Repl.). Compare also, I.C. 1971, 20-9.1-5-10 to -20 with Burns Ann. Stat. §§28-5134 to 28-5142 (1970 Repl.) (relating to safety in the operation of school buses). If any alteration of the law regarding transportation of parochial school children was intended, no sign of it appears in the above-

mentioned chapters. Indeed, it appears in the face of these fundamental similarities that the Indiana legislature acted with the same objectives in enacting the 1973 Code as it did in enacting that of 1965: that is, to promote the safety of school children by establishing standards for the qualifications of drivers and conditions of buses.

As did the Code of 1965, the Code of 1973 provides for transportation of parochial school children in a separate chapter. The 1965 Code included this section under the Title of Misecellaneous Provisions. The 1973 Code removed every other section formerly under this heading to chapters evidently deemed more appropriate.[5] The provision respecting

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5 Burns Ann. Stats. §§28-5145 and

parochial school children appears under the heading of Transportation Costs. The present language differs somewhat from the language of the Code of 1965. It is now in two sentences. The second sentence is identical to the earlier language except that 'the' is substi-

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28-5148 are to be found in the State School Bus Committee chapter as I.C. 1971, 20-9.1-4-10 and 20-9.1-4-9, respectively. Under the present School Bus Safety chapter, Burns Ann. Stats. §§28-5146, 28-5417, 28-5149, 28-5150, and 28-5151 are now I.C. 1971, 20-9.1-5-18 to -22. I.C. 1971, 20-9.1-5-21, was repealed by Acts of 1975, P.L. 237, §4. The Court does not agree with the plaintiffs' interpretation of this repeal. Since Acts of 1975, P.L. 237, §2 amends the Code to allow parents of public school children to provide transportation, a provision allowing only public school corporations, private schools and public carriers to compensate school bus drivers is no longer appropriate, and would be conflicting if allowed to stand.

tuted for 'such' in two instances. The most visible change is in the first sentence where 'shall provide transportation for them on the school bus' is substituted for 'shall afford transportation, without extra charge, by means of such school bus.' The inclusion of the phrase 'on the school bus' is equally amenable to the interpretation placed on the former language by the Indiana Attorney General in 1936 O.A.G. p. 415. 'The school bus' refers to 'a public school bus' along the regular route of which parochial school children must reside in order to be eligible for transportation. The phrase could have been omitted entirely if the legislature had not intended that it operate as a limitation. It is apparent that the Indiana Attorney General perceived

nothing in the 1973 version warranting an alteration in the 1936 interpretation. See 1980 O.A.G. No. 80-31, at p. 98. This supposition is borne out by the legislature's necessary awareness that the phrase 'on the bus' would inevitably be construed in this manner; the legislature had acquiesced in this reasoning for thirty-seven years at the time the 1973 enactment was passed.

In summary, Indiana law does not provide for transportation of parochial school children upon equal terms with public school children. The language of the statute, its history in the law of Indiana, and forty-five years altogether of consistent interpretation, necessitate this conclusion. A school corporation need only supply transportation when eligible parochial school children

can be accommodated on public school buses already in operation for the benefit of public school children.

II

The plaintiffs claim that the failure to provide transportation for parochial school children on equal terms with public school children deprives them of equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Consitution and by Article 1, §23 of the Indiana Constitution. They claim further that such failure denies the parent plaintiffs their right under the Fourteenth Amendment to send their children to the school of their choice, and impermissibly burdens the free exercise of their religion guaranteed by the First Amendment of the United States Constitution and Article 1, §2

of the Indiana Constitution.[6]

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6 Specifically, the plaintiffs claim that the statutory classification based on attendance at Catholic parochial schools is 'suspect.' The plaintiffs argue that attendance at such schools is a recognized practice of the Catholic faith and that the free exercise of religion is a fundamental right, therefore the state must show a compelling interest in order for the classification to stand, under the equal protection clause of Fourteenth Amendment of the United States Constitution. The plaintiffs claim further that the statute, as read by this Court, would violate the due process clause of the Federal Constitution, Fourteenth Amendment, on the grounds that substantive due process forbids the denial of general welfare benefits on the basis of the plaintiffs' exercise of constitutionally protected rights. These rights are specified as the right of parents to send their children to the schools of their choice, and the right to free exercise of religion. The plaintiffs claim that the statute forces an election between eligibility for general welfare benefits and the exercise of these rights, thereby placing an impermissible burden on the exercise of constitutionally protected rights. Again, the plaintiffs argue that no compelling state interest supports the statutory scheme.

Identical issues were raised under the equal protection and due process clauses of the Fourteenth Amendment in Luetkemeyer v. Kaufmann, 364 F.Supp. 376 (W.D. Mo. 1973), affirmed 419 U.S. 888, 95 S.Ct. 167, 42 L.Ed.2d 134 (1974). In that case, the court found that the maintenance of separation of church and state was a legitimate and constitutional state interest which supported a statutory scheme in which only public school children were provided transportation to and from school. The court concluded that nothing in the Federal Constitution required the State of Missouri to provide equal transportation services to parochial schools. 364 F.Supp. at 387.

The propriety of this conclusion is strongly supported by the view expressed in Norwood v. Harrison, 413 U.S. 455, 93

S.Ct. 2804, 37 L.Ed.2d 723 (1973):

> The appellees intimate that the State must provide assistance to private schools equivalent to that which it provides to public schools without regard to whether the private schools discriminate on racial grounds. Clearly, the State need not. Even as to church-sponsored schools, whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The Religion Clauses of the First Amendment strictly confine state

> aid to sectarian education. Even assuming, therefore, that the Equal Protection Clause might require state aid to be granted to private non-sectarian schools in some circumstances--health care or textbooks, for example--a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance. See San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

413 U.S. at 462, 93 S.Ct. at 2809 (original

emphasis). It has been argued on the authority of Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1946), that provision of transportation for parochial school children is parcel of general welfare legislation rather than aid to sectarian education. See Luetkemeyer v. Kaufmann, 419 U.S. 888, 95 S.Ct. 167, 42 L.Ed2d 134 (1974) (White, j., dissenting). In Norwood v. Harrison, supra, the Court clarified the 'child benefit' theory of Everson by explaining that the establishment clause of the First Amendment allows leeway for indirect aid: 'Plainly, religion benefits indirectly from governmental aid to parents and children....' 413 U.S. at 464, n. 7, 93 S.Ct. at 2810, n. 7.

In Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971),

the Court, speaking of its decision in Everson, stated:

> There Mr. Justice Black, writing for the majority, suggested that the decision carried to 'the verge' of forbidden territory under the Religion Clauses. [330 U.S., at 16, 67 S.Ct., at 511] Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinary sensitive area of constitutional law.

403 U.S. at 611-12, 91 S.Ct., at 2110.[7]

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7 While the Everson decision has continued to be cited with approval,

The plaintiffs herein argue essentially that a state cannot constitutionally withdraw from the 'verge' of which Justice Black spoke. Since Everson itself,[8] Supreme Court decisions have indicated otherwise. Norwood v. Harrison, supra, plainly indicates that the First Amendment Religion Clauses' allowance of leeway for indirect aid to religion includes scope for a legis-

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it is noteworthy that one of the five Justices who joined in the majority has since expressed 'grave doubts' as to its correctness. Walz v. Tax Commission of City of New York, 397 U.S. 664, 703, 90 S.Ct. 1409, 1429, 25 L.Ed.2d 697 (1970)(Douglas, j., dissenting).

8 '[W]e do not mean to intimate that a state could not provide transportation only to children attending public schools....' Everson v. Board of Education, 330 U.S. 1, 17, 67 S.Ct. 504, 512, 91 L.Ed. 711 (1946).

lature to decide that separation of church and state would best be served by denial of such indirect aid.

The Indiana provision limiting transportation of parochial school children seems tailored to accommodate the strictures of the Indiana Constitution, Article 1, §6, that no money be drawn from the treasury for the benefit of any religious or theological institution. According to Norwood v. Harrison, supra, this state interest is sufficiently substantial to support the statutory scheme in the face of Fourteenth Amendment challenges. 413 U.S., at 462, 93 S.Ct., at 2809.

In view of the above, this court agrees with the court in Luetkemeyer v. Kaufmann, supra, 364 F.Supp., at

387, that the United States Constitution does not require states to provide parochial school children with transportation to and from school on the same terms as public school children. Indeed, this court may not be at liberty to disagree. Mandel v. Bradley, 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977); Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) (a summary affirmance by the United States Supreme Court is binding precedent as to the precise questions presented and necessarily decided).

The same result obtains under the Indiana Constitution. Because Article 1, §23 of the Indiana Constitution protects the same rights as the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, Reilly

v. Robertson, 266 Ind. 29, 369 N.E.2d 171, 175, cert. denied 434 U.S. 825, 98 S.Ct. 73, 54 L.Ed.2d 83 (1977), the validity of a statute under the Fourteenth Amendment is strongly persuasive of its validity under the corresponding Indiana constitutional provision. Midwestern Petroleum Corp. v. State Board of Tax Commissioners, 206 Ind. 688, 187 N.E. 882, 191 N.E. 153 (1933); Sperry & Hutchinson Co. v. State, 188 Ind. 173, 122 N.E. 584 (1919). Neither does it appear that Article 1, §2, of the Indiana Constitution offers greater protection than the First Amendment to the United States Constitution. Cf. Lynch v. Indiana State University Board of Trustees, Ind.App., 378 N.E.2d 900, 903-08, cert. denied 441 U.S. 946, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1978)

(same discussion sufficing for issues raised under both First Amendment and Article 1, §2, of Indiana Constitution).

It therefore appears that the defendants are under no duty, statutory or constitutional, to provide transportation for parochial school children beyond accommodation in established public school buses of those parochial school children who reside along those routes, should seats be available. The plaintiffs make no allegation that the defendants have failed to do this much, and the defendants have repeatedly averred their intent to continue to provide such transportation. Accordingly, the plaintiffs have no ground for complaint and the defendants' Motion to Dismiss should be granted.

O R D E R

In accordance with the foregoing, it is ordered that the defendants' motion to dismiss be granted, and that the claims filed on behalf of the named plaintiffs and all parents whose children now or in the future attend a Catholic parochial school located within the jurisdiction of the South Bend Community School Corporation and all school children who now attend or who in future attend Catholic parochial schools within the jurisdiction of the South Bend Community School Corporation, be dismissed for failure to state a claim upon which relief may be granted.

Dated this 18th day of January, 1982.

/s/ Gene B. Lee
Gene B. Lee,
United States Magistrate

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Attention: Mr. Franklin A Morse, II
Mr. Patrick J. O'Neil
Mr. Gregory L. Kelly

APPENDIX B2

DISTRICT COURT'S ORDER

OF FEBRUARY 26, 1982

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ELIZABETH A. FRAME, et al.,

Plaintiffs,

vs. CIVIL NO. S81-0344

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,

Defendants.

MEMORANDUM AND ORDER

This cause is now before the Court on the plaintiffs' Motion for New Trial, to make Findings of Fact, to Amend Judgment and for Attorney's Fees. The issues raised therein have been thoroughly briefed by both the plaintiffs and defendants, therefore the Court will rule without hearing argument.

The plaintiffs' motion will be deemed a motion for amendment of the

judgment of dismissal under Rule 59(e) of the Federal Rules of Civil Procedure. Because there has been no trial on the merits in this case, a motion for new trial under Rule 59(a) is inappropriate. By their motion, the plaintiffs raise new arguments in support of their claim that Indiana law requires transportation of parochial school children on equal terms with public school children, and the plaintiffs request that this Court reconsider its order of January 18, 1982. The plaintiffs argue that the Indiana Legislature evidenced an intent to alter prior law by including a definition of school children, encompassing both public and parochial school children, in the 1973 codification of the Pupil Transportation law. A comparison of that definition, found in I.C. 1971,

20-9.1-1-4, with Burns Ann. Stat. 28-5102(a) of the former School Transportation Code discloses that the language in question is not a 'critical amendment' but merely a recodification of prior law. Upon careful examination of the plaintiffs' arguments, the Court remains persuaded of the correctness of its order of January 18, 1982.

The plaintiffs also seek an amendment of the order to include a mandatory injunction requiring the defendants to provide transportation to the extent the Indiana law is therein construed to require. They rely on Rule 54(c) of the Federal Rules of Civil Procedure, which provides that a prevailing party shall be allowed all the relief to which he is entitled regardless of whether such relief was sought in the pleadings.

Where a motion to dismiss is at issue, Rule 54(c) must be considered in conjunction with Rules 8, 12 and 15: 'its clear and long-accepted meaning is that a complaint should not be dismissed for legal insufficiency except where there is a failure to state a claim on which some relief, not limited by the request in the complaint, can be granted.' (Original emphasis). Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 925 (2d Cir. 1968). In essence, the plaintiffs seek re-consideration of the dismissal on the grounds that the pleadings, motions and other materials in the record of this cause indicate a claim based on violation of a State-created right might be maintained for injunctive relief.

The present posture of this action does not permit the issuance of an injunction as requested by the plaintiffs. Cf. United States v. 47 Bottles, More or Less, Jenasol RJ Formula "60", 320 F.2d 564, 573-74 (3rd Cir.), cert. denied sub nom. Schere v. United States, 375 U.S. 953, 84 S.Ct. 444, 11 L.Ed.2d 313 (1963) (reversing amendment of pleadings at end of trial to seek injunctive relief). Relief cannot be granted without a basis in facts pleaded and established at trial or as a matter of law. See 6 MOORE'S FEDERAL PRACTICE ¶54.62, at 1265 (2n ed. 1981). The appropriate response to the plaintiffs' motion would be to amend the order of dismissal to permit the plaintiffs to presecute (sic) the claim, rather than summarily granting relief.

The plaintiffs' motion will nevertheless be denied: 'if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.' United Mine Worker v. Gibbs, 383 U.S. 715, 726 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). The plaintiffs' asserted state claim is essentially at the pleading stage only. The considerations set out in United Mine Worker v. Gibbs, supra, outweigh the inconvenience incidental to requiring the plaintiffs to prosecute their state claim in state court. The plaintiffs' request for findings of fact and attorney's fees as well as the motion to permit submission of reply affidavits and to strike are moot.

The defendants herein have moved

for an award of attorney's fees and costs, under 42 U.S.C. §1988. It is established that a court may award attorney's fees to a prevailing defendant only 'upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.' Reichenberger v. Pritchard, 660 F.2d 280, 288 (7th Cir. 1981), quoting Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978). Upon review of the considerations set out in Reichenberger, the Court concludes that such a finding is not appropriate in the present case. The defendants' motion will be denied.

O R D E R

Accordingly, it is ordered that the

Motion for New Trial, to Make Findings of Fact, to Amend Judgment and for Attorney's Fees, the Motion for Oral Argument, and the Motion to Submit Reply Affidavits and to Strike, filed in this cause by the plaintiffs, be denied.

It is ordered further that the defendants' Motion for Costs and Attorney's Fees be denied. Each party will bear his own costs.

Dated this 26th day February, 1982.

/s/ Gene B. Lee
Gene B. Lee
United States Magistrate

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Attention: Mr. Franklin A. Morse, II
Mr. Patrick J. O'Neil
Mr. Gregory L. Kelly

APPENDIX C

COURT OF APPEALS' ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

January 27, 1983

Before

HON. WILLIAM J. BAUER, Circuit Judge

HON. RICHARD D. CUDAHY, Circuit Judge

HON. PAUL C. WEICK, Senior Circuit Judge*

ELIZABETH A. FRAME, et al., Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 82-1383 vs.	)	
SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al., Defendants-Appellees.	)	Civil No. 5(sic)81-0344 Gene B. Lee, Magistrate.

O R D E R

On consideration of the petition for

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* The Honorable Paul C. Weick, Senior Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULE

United States Constitution:

Amend. 1

Religious and political freedom.-- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

. . . .

Amend. 14

§1. Citizenship--Due process of law--Equal protection.-- . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

. . . .

Indiana Constitution:

Art. 1

§2. Right to worship.--All men shall be secured in their natural right to worship Almighty God, according to the dictates of their own consciences.

. . . .

§23. Privileges equal.--The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

Indiana Code:

20-8.1-2-1 [28-5304]. Policy.--It is the public policy of the state of Indiana:

(a) To provide, furnish and make available equal, nonsegregated, non-discriminatory educational opportunities and facilities for all regardless of race, creed, national origin, color or sex;

. . . .

20-1.9-1-3 [28-5101b]. 'Private school' defined.--As used in this article [20-9.1-1-1--20-9.1-7-4], the term 'private school' means any school which is not supported and maintained by funds realized from the imposition of a tax on property, income or sales. [IC 1971, 20-9.1-1-3, as added by Acts 1973, P.L. 218, §2, p. 1097.]

20-9.1-1-4 [28-5101c]. 'School children' defined.--As used in this

article [20-9.1-1-1--20-9.1-7-4], the term 'school children' means any children enrolled in public or private schools at any level between kindergarten and grade twelve [12]. [IC 1971, 20-9.1-1-4, as added by Acts 1973, P.L. 218, §2, p. 1097.]

. . . .

20-9.1-2-1 [28-5102]. Power to provide transportation.--The governing body of each and every school corporation may provide transportation for school children to and from school.

. . . .

20-9.1-2-29 [28-5130]. Private schools exempt.--This chapter [20-9.1-2-1--20-9.1-2-29] does not apply to any private school or to any school bus driver contract executed for a private school. [IC 1971, 20-9.1-2-29, as added by Acts 1973, P.L. 218, §2, p. 1097.]

. . . .

20-9.1-7-1 [28-5191]. Parochial school students--No charge.--When school children who are attending a parochial school in any school corporation reside on or along the highway constituting the regular route of a public school bus, the governing body of the school corporation shall provide transportation for them on the school bus. This transportation shall be from their homes, or from some point on the regular route nearest or most easily accessible to their homes, to and from the parochial school or to and from the point on the regular route which is nearest or most easily accessible to the parochial school. [IC 1971, 20-9.1-7-1, as added by Acts 1973, P.L. 218, §2, p. 1097.]

. . . .

22-9-1-2 [40-2308]. Purpose--Public policy of state.--(a) It is the

public policy of the state of Indiana to provide all of its citizens equal opportunity for education, employment, access to public conveniences and accommodations and acquisition through purchase or rental of real property including but not limited to housing, and to eliminate segregation or separation based solely on race, religion, color, sex, national origin or ancestry, since such segregation is an impediment to equal opportunity. Equal education and employment opportunities and equal access to and use of public accommodations and equal opportunity for acquisition of real property are hereby declared to be civil rights.

(b) The practice of denying these rights to properly qualified persons by reason of the race, religion, color, sex, national origin or ancestry of such person is contrary to the principles of freedom

and equality of opportunity and is a burden to the objectives of the public policy of this state and shall be considered as discriminatory practices. The promotion of equal opportunity without regard to race, religion, color, sex, national origin or ancestry through reasonable methods is the purpose of IC 1971, 22-9-1 [22-9-1-1--22-9-1-12].

. . . .

(e) IC 1971, 22-9-1 [22-9-1-1--22-9-1-12] shall be construed broadly to effectuate its purpose. [Acts 1961, ch. 208, §2, p. 500; 1963, ch. 173, §2, p. 216; 1965, ch. 214, §1, p. 484; 1967, ch. 276, §1, p. 876; 1969, ch. 298, §1, p. 1242; 1971, P.L. 357, §2, p. 1444.]

. . . .

Ind.R.App.P.

Rule 15(O). Certification of Questions of State Law from Federal Courts.

When it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning such questions or propositions of state law which certificate the Supreme Court of this state, by written opinion, may answer.

APPENDIX E

MINUTES OF SCHOOL BOARD MEETINGS

(Plaintiffs' Exhibits 2, 4 and 5)

MINUTES OF SCHOOL BOARD MEETINGS

(Plaintiffs' Ex. 2)

Board of School Trustees
August 3, 1981

Dr. Scamman said there are three approaches the Board could take. The first is a seats available interpretation. He said we do not believe we could show what an empty seat availability would be until August 20 and it is our intent to minimize those seats for economic reasons. The second approach is picking up all students who come to an existing public school route, which could mean adding more buses. He said there is no way to estimate the numbers of students interested and it is a Transpo type of service and would take some experience and practice. The third approach is providing the same level to the pa-

rochial students as provided to the public school students and living under the same policies.

. . . .

Dr. Scamman said . . . the grand total is 4,375. Some of the parents indicated some of the numbers are overstated by some amount, so the figures are only ballpark. He said we can probably work with the basic issue based on these estimates.

Dr. Scamman said it is not our intention to make a recommendation regarding this issue. He said this is a public community decision and involves local money in an unfrozen fund. Dr. Scamman said one point of view, is providing a parity service would make parochial attendance more attractive, but some schools are at capacity now. He

said we would like some direction on how the Board wishes to deal with the issue.

. . . .

Mr. Hughes said one of his major concerns is that as we started desegregating the corporation last year, we anticipated we would lose some of our student population. He said it does not please him to think we will be providing transportation to people who are fearful of yellow buses. . . . He said he would have no problem this year in dealing with a parity level system strictly as a matter of expediency and because the funds are available to us to work with.

. . . .

Mrs. Jacobson said she would agree since we decided to bus students and

have 50 new buses that we should provide transportation for all school children.

. . . .

Mr. Wilson said the problem of helping the private system survive does not bother him and he views it as a challenge.

. . . .

(Plaintiffs' Ex. 4)

Board of School Trustees
August 20, 1981

Mrs. Nancy Love asked how much was budgeted for busing of private and parochial students and Mr. Reidy said we estimate $790,000. . . .

. . . .

Mrs. Love asked how many were transported and Mr. Yates said we

bused about 500 last year. . . .

. . . .

(Plaintiffs' Ex. 5)

Board of School Trustees Meeting
September 8, 1981

Mr. Hughes said . . . we are dealing with the whole issue of coming up with a system that comes with the same problems for parochial students that we have for the corporation. Mr. Hughes said we have no intention of approving a system that will be a better deal for parochial students than for patrons of the public school system.

. . . .

Mr. Yates said . . . We want to do something more and he is convinced what we are doing today is wrong because we are providing nothing. He said he is

sensitive to the people who have not seen the people who have been working on this plan day and night. It has been our top priority and whatever we do, we must be concerned about our own competition.

. . . .

Dr. Brookins moved the Board instruct the administration to develop a transportation plan in the interim to provide for transportation of parochial students on a space available and existing school routes basis, and Mr. Yates seconded the motion.

. . . .

Upon vote on the original motion, it carried by a majority vote in the following manner: Ayes Dr. Bender, Dr. Brookins, Mr. Hughes, Mrs. Jacobson, Mr. Luber, Mr. Yates; Nays Mr. Wilson.

APPENDIX F

PLAINTIFFS' COMPLAINT

(Plaintiffs' Ex. 1)

(Plaintiffs' Ex. 1)

STATE OF INDIANA)
) SS:
ST. JOSEPH COUNTY)

IN THE ST. JOSEPH SUPERIOR COURT
MISHAWAKA DIVISION

CAUSE NO. M-81-CV-331

ELIZABETH A. FRAME;
TONI M. POTAPOW;
MARY ANN MacCARTHY;
BARBARA HARTZKE;
JOSEPH B. SCHOPMEYER;
JOHN M. WILLIAMS;
ROSEMARIE GREEN,
parent plaintiffs, individually and on behalf of all others similarly situated;
JEFFREY A. FRAME;
MICHAEL G. POTAPOW;
MICHAEL P. MacCARTHY;
JENNIFER HARTZKE;
JENNIFER A. SCHOPMEYER;
SHEILA A. WILLIAMS;
ERIN MARIE GREEN, minor plaintiffs, individually and on behalf of all others similarly situated,

vs.

SOUTH BEND COMMUNITY SCHOOL CORPORATION;
JAMES P. SCAMMAN, Superintendent of the South Bend Community School Corporation;
HOLLIS E. HUGHES, JR.;
DONALD W. YATES;
EILEEN T. BENDER;

VERIFIED COMPLAINT FOR INJUNCTIVE, DECLARATORY AND MONETARY RELIEF

OSCAR T. BROOKINS;)
ANTHONY V. LUBER;)
WILLIAM L. WILSON;)
LORETTA JACOBSEN,)
Members, Board of)
School Trustees of)
the South Bend)
Community School)
Corporation,)
)
Defendants.)

For cause of action against the defendants, the plaintiffs state that:

1. They are residents of St. Joseph County, Indiana. The parent plaintiffs are the owners of real estate located within St. Joseph County on which they pay taxes.

2. The parent plaintiffs are the parents of children who attend private Catholic parochial elementary and high schools which meet all of the requirements of State law. The minor plaintiffs attend private Catholic parochial elementary and high schools which meet

all the requirements of State Law. The schools which the minor plaintiffs attend are located within the geographical jurisdiction of the South Bend Community School Corporation (hereinafter School Corporation).

3. The parent plaintiffs sue on their own behalf and, pursuant to Trial Rule 23(B)(2) and (3), on behalf of all other taxpaying parents who have chosen to send their children to private Catholic parochial schools located within the geographical jurisdiction of the School Corporation. The minor plaintiffs sue on their own behalf and, pursuant to Trial Rule 23(B)(2) and (3), on behalf of all other children who attend private Catholic parochial schools within the geographical jurisdiction of the School Corporation.

The class is so numerous that joinder of all members is impracticable. There are questions of law or fact common to the class, and the claims of the representative parties are typical of the claims of the class. The plaintiffs will fairly and adequately protect the interests of the class. The defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive, declaratory and other relief with respect to the class as a whole.

4. The defendant James P. Scamman is the Superintendent of the School Corporation.

5. The defendants Hughes, Yates, Bender, Brookins, Luber, Wilson and Jacobsen are members of the Board of School Trustees of the School Corpo-

ration (hereinafter the School Board).

6. For several years the School Corporation, acting through the defendant Scamman and by direction of the School Board, has provided transportation for school children to and from school, including transportation for some children attending Catholic parochial schools.

7. Pursuant to I.C. 20-9.1-1-1, et seq., the School Corporation is now providing bus transportation to public school children. Even though they have been requested to do so, the School Board, School Corporation and defendant Scamman, by official policy and/or custom, have refused and are now refusing to provide the same safe transportation for the minor plaintiffs and the class they represent.

8. The actions of the School Corporation, School Board and the defendant Scamman in denying safe school transportation to the minor plaintiffs and the class they represent:

A. Is arbitrary, capricious and contrary to the laws of the State of Indiana providing for the safe transportation of school children and for equal civil rights to all citizens;

B. Denies them their rights to equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America and by Article 1, §23, of the Constitution of the State of Indiana;

C. Denies the parent plaintiffs their right to send their children to private schools of their choice as guaranteed by the Fourteenth

Amendment to the Constitution of the United States of America and compulsory school attendance laws of the State of Indiana;

D. Impermissibly burdens the rights of the parent plaintiffs and minor plaintiffs to freely exercise the religion of their choice as guaranteed by the First Amendment to the Constitution of the United States of America and Article 1,§2, of the Constitution of the State of Indiana.

9. There is an actual controversy between the parties. The plaintiffs and the class they represent have suffered and will continue to suffer irreparable injury by virtue of the acts and practices of the defendants as alleged in paragraphs 7 and 8. As a result of the acts and practices of the

defendants, the minor plaintiffs and the class they represent have been denied and are being denied safe transportation to schools of their choice; the parent plaintiffs have incurred and will incur expenses to provide transportation for their children to school. Unless they are enjoined, the defendants will continue to deprive the plaintiffs of their rights and privileges as guaranteed by the Constitutions and laws of the United States and the State of Indiana.

WHEREFORE, plaintiffs pray as follows:

1. For an order pursuant to Trial Rule 23(C)(1) that this suit be maintained as a class action;

2. For a declaratory judgment that the acts and practices of the defendants

arbitrarily discriminate against the parents of Catholic parochial school children, and the children themselves, are contrary to the compulsory school attendance laws, pupil transportation and civil rights laws of the State of Indiana, the Federal Civil Rights Act of 1871 (42 U.S.C. §1983), the First and Fourteenth Amendments to the United States Constitution and Article 1, §§2 and 23, of the Indiana Constitution;

3. For an order mandating that the defendants provide the parochial Catholic school children with school bus transportation to their chosen schools, using the same guides and eligibility requirements encompassed within the plan developed to transport children who attend public schools;

4. For an order awarding the

plaintiffs and the class members the damages they have sustained and will sustain on account of the illegal, unconstitutional acts of the defendants;

5. For an order awarding plaintiffs reasonable attorney's fees and costs;

6. For such other and further relief as the interests of justice may require.

We affirm under the penalties for perjury that the foregoing representations are true.

/s/ Elizabeth A. Frame
Elizabeth A. Frame

/s/ Toni M. Potapow
Toni M. Potapow

/s/ Mary Ann MacCarthy
Mary Ann MacCarthy

/s/ Barbara Hartzke
Barbara Hartzke

/s/ Joseph B. Schopmeyer
Joseph B. Schopmeyer

/s/ John M. Williams
John M. Williams

/s/ Rosemarie Green
Rosemarie Green

/s/ Jeffrey A. Frame
Jeffrey A. Frame

/s/ Michael G. Potapow
Michael G. Potapow

/s/ Michael P. MacCarthy
Michael P. MacCarthy

/s/ Jennifer Hartzke
Jennifer Hartzke

/s/ Jennifer A. Schopmeyer
Jennifer A. Schopmeyer

/s/ Sheila Williams
Sheila A. Williams

/s/ Erin Marie Green
Erin Marie Green

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Attorney for Plaintiffs

APPENDIX G

DEFENDANTS' MOTION TO DISMISS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ELIZABETH A. FRAME; et al,	)	
Plaintiffs, individually and on behalf of all others similarly situated,	)	CIVIL NO. 581-0344
v.	)	
SOUTH BEND COMMUNITY SCHOOL CORPORATION; et al,	)	
Defendants.	)	

MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM

The defendants, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, respectfully move that the complaint be dismissed for failure to state a claim upon which relief can be granted.

In support of the motion to dismiss, the defendants state:

1. The plaintiffs allege that the defendants' failure to provide bussing to the private Catholic school students within its jurisdiction violates the statutes and Constitution of the State of Indiana and the Constitution of the United States.

2. The defendants are willing to provide transportation to that number of non-public school students who can be accomodated in school busses already in operation over regularly established routes for the reason that the laws and Constitution of the State of Indiana and the Constitution of the United States require them to do no more.

3. Thus, plaintiffs' complaint should be dismissed for failure to state a claim upon which relief can be

granted.

4. A memorandum in support of the motion to dismiss is filed contemporaneously herewith.

Dated this 14 day of October, 1981.

THORNBURG, McGILL, DEAHL, HARMAN, CAREY & MURRAY

/s/ Franklin A. Morse, II
Franklin A. Morse, II
Sixth Floor, First Bank Building
South Bend, Indiana 46601
Telephone: (219) 233-1171

Attorney for the defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been delivered to Timothy W. Woods, 1800 American National Bank Building, South Bend, Indiana 46601, attorney for the plaintiffs, by placing the same in the United States mail, postage prepaid.

/s/ Franklin A. Morse, II